

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

LANDMARK LEGAL FOUNDATION

Plaintiff,

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

Case No. 1:12-cv-01726 (RCL)

**PLAINTIFF'S SURREPLY OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The Environmental Protection Agency (EPA or Plaintiff) presents in its Reply Memorandum in Support of its Motion for Summary Judgment a new version of the facts surrounding the critical issue in this matter of whether the Agency conducted an adequate and good faith search of the Administrator, Deputy Administrator, and the Administrator's Chief of Staff's records in response to the Freedom of Information Act (FOIA) request at issue in this case. This latest version is inconsistent with EPA's initial account as described in its opening memorandum and raises new questions that Landmark ought to have the opportunity to pursue in a hearing before the court.

Plaintiff respectfully seeks leave to file this surreply and request for hearing. Absent this surreply, Landmark will be unduly prejudiced by EPA's latest submission. *See Banner Health v. Sebelius*, 905 F.Supp. 2d 174, 187 (D.C. Dist. 2012).

In its opening memorandum, EPA asserts that Landmark agreed to exclude the Administrator, Deputy Administrator and the Administrator's Chief of Staff from the search for responsive records. See EPA Memorandum in Support of Summary Judgment, Doc. 31, pp. 13-14; Defendant's Statement of Material Facts, Doc. 31, p. 4, ¶4; Declaration of Eric E. Wachter, Doc. 30-1, pp. 4-5, ¶11. Landmark has demonstrated that this is utterly false. Plaintiff's Opposition to Defendant's Motion for Summary Judgment, pp. 11-14.

EPA FOIA officials, however, accordingly issued search instructions emphasizing that: **"Note: This request has been modified. The search only applies to assistant administrators, deputy assistant administrators and chiefs of staff in EPA headquarters."** (Wachter Declaration, Doc. 30-1, p. 5, ¶ 12 (emphasis in original).) Mr. Wachter testifies that "[m]y office initiated a search for records, as narrowed by agreement, on October 23, 2012, by electronic mail." (Id., p. 4, ¶ 11.) These instructions were absolutely improper. Landmark Opposition, pp. 11-14.

EPA's initial version of the facts claims that the Office of the Administrator was included in the FOIA office's email, but, according to Mr. Wachter, that he later determined that the Administrator, her chief of staff and the Deputy Administrator's records may not have been adequately searched. EPA Memorandum, Doc. 31, pp. 7.

Landmark responded to the disclosure that the most senior political officials at EPA were omitted from the search request by requesting that discovery and possibly sanctions ought to be ordered by the Court in order to determine why these most senior EPA officials' records were not searched for responsive records until the end of April, 2013 -- months after the Administrator's departure from EPA. Plaintiff's Opposition, p. 22.

In its Reply Memorandum and supporting testimony, EPA changes its story, now making the claim that the Administrator, her Chief of Staff and the Deputy Administrator's records were

not covered by the FOIA office's original email direction, but were actually covered by a separate email direction issued three weeks later. EPA Reply Memorandum, Doc. 35, p. 6. EPA's new account states that a search of the Administrator's office was initiated on November 14, 2012 by an email sent by Mr. Jonathon Newton. (Id., citing Supplemental Declaration of Eric E. Wachter, Doc. 35-7, ¶ 17.) The Newton email is obviously the best evidence of its contents, but is not provided by EPA. Mr. Newton's email is described as having included the same limited search parameters as the initial FOIA office search direction, as the Newton email was simply "forwarding the instructions that were sent to the FOIA coordinators for the other program offices on October 23, 2012. . . ." (Id.)

Mr. Wachter's supplemental declaration thus raises two critical factual issues that cannot be addressed by the record before the Court: 1) EPA does not present the best evidence of the Newton instructions -- the Newton November 14, 2012 email, which is critical to the questions before the court; and 2) whether in fact the Administrator, her chief of staff, and the Deputy Administrator's records were searched, and, if so, if they were searched in a manner improperly limited by the directions purportedly included in the Newton email.

Based on this new information, EPA's reply presents the misleading claim that the Administrator's records were searched for responsive records from the very beginning. EPA Reply Memorandum, Doc. 35, p. 4. In truth, we cannot tell from the record in this case which offices were searched, when and for what responsive information. It appears that to the extent the Administrator's records were searched, they were searched only for records relating to officials other than herself, her chief of staff and her Deputy Administrator.¹ But we simply do

¹ It also remains unclear whether the initial search of the Administrator, et al's offices were limited as a result of bad faith.

not know what the facts are based on this record. To be nearly a full year after the submission of Landmark's FOIA request and be at this stage is simply unacceptable.

EPA's revised explanation of the search for records in the most senior officials' offices raises more questions than existed before. Together with EPA's failure or refusal to answer the still ignored question as to whether covered officials were instructed to search their private email accounts, EPA's introduction of new, inconsistent evidence precludes summary judgment and makes discovery and a hearing by this Court all the more necessary.

Respectfully submitted,

Landmark Legal Foundation

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing Memorandum of Points and Authorities In Support of Plaintiff's Preliminary Injunction was filed electronically with the Court by using the CM/ECF system on this 30th day of July, 2013.

Parties that are registered CM/ECF users will be served by the District Court's CM/ECF system.

/s/ Michael J. O'Neill
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